FILE COPY

Supreme Court, U. S.
MAR 8 1928

In the Supreme Court of the United States.

No. 15, Original, October Term, 1927.

THE STATE OF COLORADO, *Complainant*,

vs.

THE STATE OF KANSAS and THE FINNEY COUNTY WATER USERS' ASSOCIATION, a Corporation, *Defendants*.

Brief for Defendants on Their Motion to Dismiss the Bill of Complaint in Equity and the Case.

WILLIAM A. SMITH,
Attorney-general of the State of Kansas,
JOHN G. EGAN,
Asst. Attorney-general of the State of Kansas,
CHESTER I. LONG,
Solicitors for the State of Kansas.
F. DUMONT SMITH,
LAWRENCE LEWIS,
CHESTER I. LONG,
Solicitors for the Finney County Water Users' Association, a Corporation.

12-2441

INDEX.

PAGE

SOME ALLEGATIONS IN THE BILL OF COMPLAINT 5

THE MOTION TO DISMISS 10

POINTS AND AUTHORITIES:

Effect of the judgment in Kansas v. Colorado 11

The bill should not be entertained to avoid multiplicity of suits 11

Interference with Colorado water administration should not prevent decrees 12

Review by this Court on certiorari of decrees of the District Court 12

The rights of water appropriators not parties to that suit were not determined by the decision in Kansas v. Colorado, 12

Appropriators of water from a river may assert their priorities, regardless of state line 13

Both riparian and appropriation rights have been recognized by California, Montana and Nebraska 13

The statutes of Kansas have recognized and do recognize the right to appropriate water for the purpose of irrigation 13

DISCUSSION OF THE BILL 14

THE EFFECT OF THE DECISION IN KANSAS V. COLORADO 30

THE FEDERAL COURTS HAVE UNIFORMLY UPHELD THE RIGHTS OF PRIVATE APPROPRIATORS TO ASSERT THEIR PRIORITIES REGARDLESS OF STATE LINES 34

CONCLUSION 41

STATUTES OF KANSAS CONCERNING APPROPRIATION OF WATER FOR IRRIGATION 37–39

General Statutes of Kansas, 1868, chap. 23, art. 2, sec. 5 (p. 192); chap. 23, art. 2, sec. 89 37

Laws of Kansas, 1872, chap. 105 37

Laws of Kansas, 1876, chap. 58 37

Revised Statutes, Kansas, 1923, secs. 13-606 and 13-608 38

Laws of Kansas 1886, chap. 115 38

Laws of Kansas, 1889, chap. 165 38

Laws of Kansas, 1891, chap. 133 39

Laws of Kansas, 1899, chap. 95 39

Laws of Kansas, 1899, chap. 151 39

In the Supreme Court
of the United States.

No. 15, Original, October Term, 1927.

THE STATE OF COLORADO, *Complainant*,

vs.

THE STATE OF KANSAS and THE FINNEY COUNTY WATER USERS' ASSOCIATION, a Corporation, *Defendants*.

Brief for Defendants on Their Motion to Dismiss the Bill of Complaint in Equity and the Case.

The defendants have filed a motion to dismiss the bill in equity and the case. This motion is separately printed, but the points contained therein are hereinafter indicated.

Some Allegations in the Bill of Complaint.

The bill of complaint in equity filed by Colorado seeks to prevent the determination of priority in water appropriations between the Finney County Water Users Association in Kansas and a large number of appropriators in Colorado which take water from the Arkansas river and its tributaries.

Some of the points alleged in the bill of complaint are as follows, referring to the bill by paragraphs:

PARAGRAPH SECOND: The Finney County Water Users Association is a Kansas corporation, organized to operate an irrigation canal

taking water from the Arkansas river in Kansas to irrigate lands in that state.

PARAGRAPH THIRD: The Arkansas river and its course are described and the dependency on the water therein of irrigators in Colorado.

PARAGRAPH FOURTH: Some irrigation has been practiced by which about 40,000 acres of land have to some extent been irrigated in Kansas.

PARAGRAPH FIFTH: The legislation and administration by Colorado in water appropriation and irrigation matters.

PARAGRAPH SIXTH: The constitution, and some statutes and decisions of Colorado and some litigation with New Mexico on that subject.

PARAGRAPH EIGHTH: The development of irrigation by water from the Arkansas river and its tributaries in Colorado. An adjudication of priority of rights in Kansas appropriators would disrupt the administration of the Colorado irrigation laws. The case of *Kansas v. Colorado* in this Court began about May 20, 1901, in which various water appropriators in Colorado were made defendants, the intervention by the United States in that suit, and the decision by this Court of May 13, 1907, therein; and that there might be equitable limitations on the rights of Colorado in the use of water from the Arkansas river. The record and proceedings in that case are made a part of the bill of complaint by reference.

PARAGRAPH NINTH: The reliance of Colorado upon the decision in *Kansas v. Colorado.*

PARAGRAPH TENTH: The developments in Colorado in reliance upon decision in *Kansas v. Colorado.*

PARAGRAPH ELEVENTH: The suits begun and maintained by citizens of Kansas in the United States District Court of Colorado

against parties in Colorado as to the respective rights of the complainants and defendants in those suits to the use of the water from the Arkansas river and the effect of such suits.

PARAGRAPH TWELFTH: Reference is made to the suits referred to in paragraph eleventh, and such suits are specifically described.

One brought about August 27, 1910, by the United States Irrigating Company, a Kansas corporation, against various water appropriators in Colorado. It is alleged that the state of Colorado and the state of Kansas was neither a party to that suit, and that the suit was settled.

Another suit brought by the Finney County Water Users Association about November 27, 1916, against the Graham Ditch Company *et al.*, appropriators of water in Colorado; and another by the same complainant brought about January 23, 1923, against the Coler Ditch Company *et al.*, on the same subject.

These suits are alleged to have been brought in the United States District Court in Colorado, and to involve questions of priority in water rights as to water taken from the Arkansas river in Colorado and Kansas.

It is further alleged in paragraph twelfth, page 31 of the bill, that the state of Kansas has not sought or asserted any rights in the United States District Court in Colorado, and the state of Colorado has not submitted itself to the jurisdiction of that Court. Unless The Finney County Water Users Association is enjoined in this suit that association will offer testimony, and require the defendant in that suit to offer testimony and cause to be adjudicated in the United States District Court in Colorado the relative rights in water appropriations of the plaintiff and defendant therein; and also the relative rights of the state of Colorado and the state of Kansas as a whole.

PARAGRAPH THIRTEENTH: The relations of the issues and parties in those suits in the United States District Court in Colorado to the litigation and decision in the case of *Kansas v. Colorado.*

PARAGRAPH FOURTEENTH: That any adjudication in the United States District Court in Colorado of the two pending cases by the Finney County Water Users Association would interfere with and disrupt the administration of water appropriation rights by Colorado. These suits are stated to involve questions of priorities.

PARAGRAPH FIFTEENTH: The control by the state of Colorado over water appropriations and some reservoirs constructed by Colorado to store water from tributaries of the Arkansas river and the use for irrigation by some public institutions in Colorado of water from that river or its tributaries.

PARAGRAPH SIXTEENTH: Negotiations between the state of Colorado and the state of Kansas to settle their sovereign rights as to the waters, and thereby the rights of the citizens and appropriators within their boundaries. No conclusion is alleged of such negotiations.

PARAGRAPH SEVENTEENTH: The users of water in each state derive their rights from their respective states. The effect of a decision in the cases brought by the Finney County Water Users Association.

PARAGRAPH EIGHTEENTH: The effect of the pendency of the cases brought by the Finney County Water Users Association upon the defendants therein and that no appeal lies of right from a decree in such suits to this Court.

PARAGRAPH NINETEENTH: Various effects that will follow from the continuance of said suits brought by the Finney County Water Users Association, one of which will be that it will determine the relative individual usufructuary relations between the water users of the two states.

PARAGRAPH TWENTIETH: The state of Colorado offers to do equity to the state of Kansas in respect to the administration and use of the waters of the Arkansas river.

PARAGRAPH TWENTY-FIRST: The prayer.

There is no allegation that the state of Kansas threatens or intends to bring a suit against the state of Colorado, or against any parties in Colorado, to present questions of rights to the use of water from the Arkansas river, or its tributaries.

There is no allegation that any party, other than the Finney County Water Users Association, is maintaining any suit against any parties in Colorado presenting any questions of such water rights.

There is no allegation that any party in Kansas threatens or intends to bring a suit against any party in Colorado to present any such questions as to water rights. Of course there are allegations concerning the pendency of the two suits referred to by the Finney County Water Users Association, and that such two suits will be prosecuted unless the Finney County Water Users Association is prevented therefrom by order of this Court.

The allegations show that the questions presented in the two suits brought by the Finney County Water Users Association are of priorities of rights of appropriation of water from the Arkansas and its tributaries in Colorado and the Arkansas river in Kansas.

There is no allegation that the two suits brought by the Finney County Water Users Association present any questions merely of riparian rights, as distinguished from water appropriation rights for irrigation.

The Motion to Dismiss.

The defendants, the State of Kansas and the Finney County Water Users Association, have filed a motion to dismiss the bill of complaint in equity and the case for want of jurisdiction of the Court and for want of equity apparent on the face of the bill.

The points presented by the motion are these:

1. That the claims asserted in paragraph twelfth of the bill, concerning the suit which had been brought and was afterwards settled, of *The United States Irrigating Company, a Kansas Corporation, v. The Graham Ditch Company et al.*, were for a priority of rights and appropriation of water flowing in the Arkansas river.

2. The claims asserted in the bill, referred to in paragraph twelfth thereof, in a suit brought by *The Finney County Water Users Association v. The Graham Ditch Co. et al., and The Coler Ditch Company et al.*, were for such priority of rights.

3. The decision and judgment of the Supreme Court of the United States in the case of *Kansas v. Colorado*, reported in 185 U. S. 125, 46 L. Ed. 838, and 206 U. S. 46, 51 L. Ed. 956, referred to in the bill, did not pass upon any claims for or rights of priorities to the appropriation of such water, as between the United States Irrigating Company or the Finney County Water Users Association, on the one side, and any party in Colorado on the other side.

4. The bill of complaint does not make any specific allegation that any party in Kansas threatens to or will bring any suit against any party in Colorado to present any question of such priorities of rights, other of course than the pending suits by the Finney County Water Users Association.

5. The bill of complaint does not allege that the state of Kansas has threatened or intends to bring any suit against the state of Colorado, or against any party in Colorado, involving any claim

of such rights, between any party in Kansas on the one side and any party in Colorado on the other side, involving any such priorities, or to obtain any decree on any such question.

6. The bill does not make a party thereto any party in Colorado or in Kansas which might be affected by any decree of this case, other than the Finney County Water Users Association.

7. The state of Colorado has no right to maintain this suit in order to have determined, or to prevent the litigation of, any question of such priorities as between the Finney County Water Users Association on the one side and any party of Colorado on the other side.

Points and Authorities.

The judgment in Kansas v. Colorado did not pass upon any question of priorities in water rights between water appropriators in Kansas and Colorado.

Kansas v. Colorado, 185 U. S. 125, 46 L. Ed. 838, and 206 U. S. 46, 51 L. Ed. 956.

As the questions of law and fact are different in controversies between appropriators of water from the Arkansas river and its tributaries in Colorado and from the Arkansas river in Kansas, this bill should not be entertained on the theory of avoiding multiplicity.

2 Story's Equity Jurisprudence, 14 ed., secs. 1174, 1177.

Hale v. Allinson, 188 U. S. 56, 78-80, 47 L. Ed. 380.

Kirwan v. Murphy, 189 U. S. 35, 54, 37 L. Ed. 698, 705.

U. S. v. Bitter Root Investment Company, 200 U. S. 451, 479, 50 L. Ed. 550.

Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276, 286, 53 L. Ed. 796.

St. Louis & Iron Mountain Ry. Co. v. McKnight, 244 U. S. 368, 375, 376, 61 L. Ed. 1200.

Kelly v. Gill, 245 U. S. 116, 121, 122, 62 L. Ed. 185.

Barstow v. Mingo Drainage District, 264 F. 224.
Carey v. McMillan, C. C. A. 8th Circuit, 289 F. 380, 384.
Rochester German Ins. Co. v. Schmidt, 175 F. 720, 99 C. C. A. 296.
Mechanics Ins. Co. v. Hoover Distilling Co., 173 F. 888, 97 C. C. A. 400, 31 L. R. A., n. s., 873.
Kansas City, &c., Ry. Co., v. Quigley, 181 F. 190.
Pittsburgh & W. V. Railway Co. v. U. S., 6 Fed. (2d) 646, 649.
Mountain Lumber Co. v. Davis, 11 F. (2d) 219, 220, C. C. A. 2d Circuit. Writ of certiorari denied. 271 U. S. 674, 70 L. Ed. 1145.
Kieffer v. Kinney Coastal Oil Co., 9 Fed. (2d) 260. 264, C. C. A. 8th Circuit.

Interference by decrees, in the two suits brought in the United States District Court in Colorado by the Finney County Water Users Association, of the Colorado irrigation administration, is not a defense against the entering of decrees in favor of the plaintiff in those suits.

Ex parte New York, 256 U. S. 490, 502, 503, 65 L. Ed. 1057, 1063.

If grounds should exist therefor the losing parties in the cases in the United States District Court in Colorado could obtain a review by this Court of the decrees of that Court through writs of certiorari.

Sec. 347 U. S. Code 1926, amending sec. 240, Judicial Code.
2 Mason's U. S. Code Annot. Title 28, ch. 9, sec. 347, 43 St. L. 938.

The rights of water appropriators not parties to that suit were not determined by the decision in Kansas v. Colorado.

Brandon v. Ard, 211 U. S. 23, 53 L. Ed. 68.

Appropriators of water from a river may assert their priorities, regardless of state line.

Wyoming v. Colorado, 259 U. S. 419, 66 L. Ed. 999.
Hoge v. Eaton, 135 Fed. 411.
Weiland v. Pioneer Irrigation Co., 259 U. S. 498, 66 L. Ed. 1027.
Miller and Lux v. Rickey, &c., Co., 137 Fed. 573.
Rickey, &c., Co. v. Miller and Lux, 218 U. S. 258, 54 L. Ed. 1032.
Lux v. Haggin, 69 Cal. 255.
Katz v. Walkinshaw, 141 Cal. 117.
Bean v. Morris, 221 U. S. 485, 55 L. Ed. 821.

Both riparian and appropriation rights have been recognized by California, Montana and Nebraska.

Lux v. Haggin, 69 Cal. 255.
Katz v. Walkinshaw, 141 Cal. 117.
4 Kinney on Irrigation, 2d ed., sec. 1786.
Smith v. Denniff, 24 Mont. 20.
4 Kinney on Irrigation, 2d ed., sec. 1880.
Crawford County v. Hathaway, 67 Neb. 325, 93 N. W. 781.
4 Kinney on Irrigation, 2d ed., sec. 1889.

The statutes of Kansas have recognized and do recognize the right to appropriate water for the purpose of irrigation.

General Statutes of Kansas, 1868, chap. 23, art. 2, sec. 5 (p. 192), chap. 23, art. 2, sec. 89.
Laws of Kansas, 1872, chap. 105.
Laws of Kansas, 1876, chap. 58.
Revised Statutes, Kansas, 123, secs. 13-606 and 13-608.
Laws of Kansas, 1886, chap. 115.
Laws of Kansas, 1889, chap. 165.
Laws of Kansas, 1891, chap. 133.
Laws of Kansas, 1899, chap. 95.
Laws of Kansas, 1899, chap. 151.
Laws of Kansas, 1895, chap. 155.

Revised Statutes, Kansas, 1923: Clause 37, sec. 17-202; secs. 42-109 to 42-118; 42-120; 42-316 and 42-317, 42-101 to 42-108; 42-120 to 42-122; 42-301 to 42-304; 42-310 to 42-315; 42-321 to 42-3111.

Conf. Clark v. Allaman, 71 Kan. 206.

Discussion of the Bill.

We have read and reread the bill carefully and confess ourselves in doubt as to what form of relief the complainant is seeking. In its motion for leave to file the bill it speaks of it in the following language: "in the nature principally of a bill of peace."

The prayer asks that the Finney County Water Users Association be prohibited and enjoined from further prosecuting and carrying on the litigation referred to in the United States District Court for Colorado and that the state of Kansas and its citizens or inhabitants be enjoined from litigating the relative rights of the two states and their citizens to the waters of the Arkansas river except by proceedings in this Court. The judge of the United States District Court in Colorado is not made a party defendant, although it is alleged that that Court is without jurisdiction; an allegation proper to an application for a writ of prohibition.

The bill describes correctly the nature of the two cases pending in the United States District Court for Colorado in which the defendant, the Water Users Association, is plaintiff; one against the Graham Ditch Company *et al.* and the other against the Coler Ditch Company *et al.*; they are actions to assert priority over the defendants of 250 second-feet of the flow of the Araknsas river and to enjoin the defendants from diverting any water from the river until the appropriation of the defendant, Water Users Association, has been satisfied.

Ordinarily a court will not take judicial notice of the pleadings or proceedings in another cause, even though it is pending in the

same court or decided by the same judge, but where, as in a bill of peace, or an application for a writ of prohibition, action of the lower court is sought to be curbed or ousted by this Court, we think the rule is that this Court will take judicial knowledge of the proceedings in the cases complained of. As stated in the bill, the case of *The Finney County Water Users Association against the Graham Ditch Company et al.* was begun in November, 1916. A motion to dismiss was filed. Judge Lewis refused to pass on this motion until the final decision in the case of *Wyoming v. Colorado*, 259 U. S. 419, 66, L. Ed. 999, so the case remained in that shape until this Court in the last-mentioned case decided that political divisions and state lines do not interfere with the right of prior appropriation. In the meanwhile Judge Lewis had been promoted to the Circuit Court of Appeals and Judge Symes appointed in his place. The motion was then argued and elaborately briefed. We have here attempted to anticipate the contentions of the complainant to avoid a reply brief because we are satisfied that they intend to raise here all of the contentions that were fully set out and briefed in the Graham Ditch Company case, and all of which were overruled by Judge Symes. The defendants were put to answer. The plaintiff spent a year and a half taking its testimony of some 2,500 pages and rested its case in June, 1927. The testimony was taken by depositions. This case involved only the diversion of water from the main stream of the Arkansas, but it had developed that beginning about 1902 or 1903 Colorado appropriators had constructed vast reservoirs on the tributaries of the Arkansas, impounding millions of acre-feet of water, which were intended to and do now impound and hold all of the flood waters of these streams. These floods in the summer time from rains in the mountains are frequent and the surplus of them formerly passed down the river to the defendant's, Water Users Association, ditch and gave an occasional

run of water in the growing season. The construction of these reservoirs has completely cut off the ordinary flood waters from the defendant, to its very great detriment and loss. So in 1922 the suit was brought against the Coler Ditch Company *et al.*, defendants, taking water from the tributaries of the Arkansas. It is alleged that not all of those who divert water from the tributaries have been made parties to that suit. We submit that that is not a ground for a bill of peace or prohibition; that is a matter for the lower Court. A motion to dismiss was interposed in that Court and overruled and the defendants have answered.

In both of these cases the defendants had raised a question of jurisdiction, both by their motion and their answer; they had urged, as they do here, that under the decision of *Kansas v. Colorado*, 206 U. S. 46, 103, 51 L. Ed. 956, no one but the state of Kansas can maintain any action for diversion of the flow of the Arkansas in Colorado; that the water users had no standing in Court and the Court no jurisdiction as between these individual appropriators. There is no doubt as to their having urged these objections in a timely way and at every possible stage of the case, so unless they have some new theory as to the law we are pretty well advised as to their contention. From the description in the bill it clearly appears that these two cases sought to be enjoined and stopped are purely suits for the priority of appropriation between irrigators on the same stream; suits between private corporations, individuals, and copartnerships to establish individual rights and to prevent individual wrongs.

Turning again to the bill and expressing our doubt as to the form of relief sought, we note that in the motion of the attorney-general for leave to file its bill he says that his "bill is in the nature principally of a bill of peace"; as to what the rest is he does not enlighten the Court either in the motion or the bill. There are allega-

tions in the bill that would be pertinent to a bill of peace, others utterly not pertinent to such a remedy, but possibly pertinent in an application for a writ of prohibition; but if the bill is to be treated as a bill of peace it is fatally defective in two particulars.

It will be conceded that the equity jurisdiction here involved is for the sole purpose of preventing a multiplicity of suits. The purpose of a bill of peace is thoroughly well settled in a case like this. The complainant alleges that the Finney County Water Users Association is harassing and threatening to harass many parties in Colorado by the prosecution of two suits in the United States District Court in Colorado. It therefore asks this Court to take jurisdiction of the entire controversy, and render one judgment that will settle the whole controversy. We think there will be no dispute upon that point. Counsels' idea seems to be that they can enjoin the defendant, the Water Users Association, from continuing its private litigation without affording it any remedy elsewhere; that this Court may enjoin the defendant Water Users Association from asserting its claim and rights in a private suit against private parties in a court having jurisdiction of the defendant parties and of the subject matter. We challenge them to find any case where any court of equity has ever, under the guise of a bill of peace, taken jurisdiction of controversies to prevent multiplicity of suits without taking jurisdiction of all of the controversies, and thus affording the parties relief by the broad jurisdiction of equity.

No case can be cited where a bill has been entertained, whose sole and avowed purpose, as shown by the allegations and the prayer of the bill, is simply to stop the litigation in the court below, to prevent the assertion of private rights and leave the defendant Water Users' Association, as an injunction here would leave it, without any remedy whatever, and permit the Colorado water users to

continue that course of spoliation of that defendants' rights which has been so profitable to them for over forty years. That is the object of the bill.

There is another fatal objection to the bill that if there were alleged to be any other parties in Kansas than the Finney County Water Users Association which are litigating or threatening litigation against the water users in Colorado, and there is no such allegation, there is nothing to show that their claims to be the same in order of appropriation, or based upon the same facts. It appears from the bill that in the two cases brought by the Finney County Water Users' Association against various parties in Colorado the questions presented are of priorities of respective water rights between the plaintiff and the various defendants. The controversy between each of those defendants and the Finney County Water Users Association would be separate upon the facts, depending upon different priorities. While the decisions in the state courts are in some confusion with relation to such circumstances, the decisions of this Court are clear that where there are several or many distinct controversies to be considered it will not take jurisdiction of a bill of peace. Under such circumstances there is no avoidance of multiplicity of litigation, and the result of the bill of peace would be merely to take into one suit many different and independent lawsuits. Under the rule followed by this Court that cannot be done.

On this subject it is said in 2 Story's Equity Jurisprudence, 14th ed.:

> "SEC. 1174. *Use of Bill of Peace to Prevent Multiplicity of Suits.*—One class of cases to which this remedial process is properly applied is where there is one general right to be established against a great number of persons. And it may be resorted to either where one person claims or defends a right against many, or where many claim or defend a right against one. In such cases courts of equity interpose in order to prevent multi-

plicity of suits; for as each separate party may sue or may be sued in a separate action at law, and each suit would only decide the particular right in question between the plaintiff and defendant in that action, litigation might become interminable. Courts of equity, therefore, having a power to bring all the parties before them, will at once proceed to the ascertainment of the general right; and if it be necessary, they will ascertain it by an action or issue at law, and then make a decree finally binding upon all the parties."

"SEC. 1177. *There Must Be a Clear Right Affecting Many Persons.*—But to entitle a party to maintain a bill of peace, it must be clear that there is a right claimed which affected many persons, and that a suitable number of parties in interest are brought before the court; for as the right is disputed between two persons only, not for themselves and all others in interest, but for themselves alone, the bill will be dismissed, for it cannot then conclude any persons but the very defendants."

Perhaps the leading case on this subject is *Hale v. Allinson*, 188 U. S. 56, 78, 80; 47 L. Ed. 380. In that case the receiver of an insolvent Minnesota bank brought a suit in equity to recover the statutory liability of certain stockholders in the bank residing in Iowa. The Court considers the whole matter. It affirms the decision of Judge McPherson of the trial court and adopts his language, in which he points out that the defendant stockholders have no common interest; that their defenses would be different; that it would make long, drawn out, and expensive litigation, and that it would not, as is the purpose of this branch of equity, bring peace. And the Court says that in that case it would put the defendants to much greater inconvenience to be so joined than would be compensated for by the superior conveniences of a single plaintiff. And the Court further holds that to warrant this interpretation of equity there must be a community of law and of fact between them; that is, the law and the facts must be the same as to each one of them, and applying that test it denied the jurisdiction, and the bill was dismissed.

This case was followed and approved in *Kirwan v. Murphy*, 189 U. S. 35, 54, 37 L. Ed. 698, 705, and in *U. S. v. Bitter Root Investment Company*, 200 U. S. 451, 479, 50 L. Ed. 550.

In order to maintain a bill of peace to avoid multiplicity of suits something more is required than the beginning of a single action by a defendant with honest purpose to settle the rights of the parties. Suit to enjoin the enforcing of an ordinance imposing a monthly municipal license tax upon a public service water company.

Boise Artesian Hot and Cold Water Co. v. Boise City, 213 U. S. 276, 286, 53 L. Ed. 796.

A bill of peace will not lie against several defendants by a railroad carrier to enjoin the bringing of suits by the defendants to recover alleged overcharges for transportation of freight and passengers. The claim of each defendant presents a separate controversy as to questions of fact. The bill contains no allegation that a controverted question of law, common to all the claimants, is involved which will determine their right to recovery, or even that there is involved a question of law, not fundamental, in which they have a common interest.

St. Louis & Iron Mountain Ry. Co. v. McKnight, 244 U. S. 368, 375, 376, 61 L. Ed. 1200.

A bill against stockholders to collect unpaid subscriptions to stock would not lie. The controversies were separate on the law and the facts.

Kelley v. Gill, 245 U. S. 116, 121, 122, 62 L. Ed. 185.

A bill of peace will not lie where the questions of fact and law are separate as to the several defendants.

Barstow v. Mingo Drainage District, 264 F. 224.

In order that a bill of peace to prevent multiplicity of suits can be maintained, the other suits must be such that the plaintiff in the bill of peace will be a necessary party thereto.

Carey v. McMillan, C. C. A. 8th Circuit, 289 F. 380, 384.

A bill of peace will not lie to avoid multiplicity of suits where the claims of the defendants are separate and distinct as to facts and law. On the same proposition see the following three cases, in each of which there is a full discussion of the law.

Rochester German Insurance Co. v. Schmidt, 175 F. 720, 99 C. C. A. 296.

Mechanics Insurance Company v. C. A. Hoover Distilling Co., 173 F. 888, 97 C. C. A. 400; 31 L. R. A., n. s., 873.

Kansas City, &c., Ry. Co. v. Quigley, 181 F. 190.

On the same point see, also—

Pittsburgh & W. V. Ry. Co. v. U. S., 6 Fed. (2d) 646, 649, United States District Court, Western District of Pennsylvania.

In order that a bill of peace should lie it is not sufficient that each of the parties plaintiff and defendant has an interest in the determination of the same legal proposition. This bill was for an accounting of alleged freight overcharges on many separate shipments by different shippers.

Mountain Lumber Co. v. Davis, 11 F. (2d) 219, 220, C. C. A. 2d Circuit. A writ of certiorari was denied (271 U. S. 674, 70 L. Ed. 1145).

A bill of peace will not lie where the questions of fact and law are separate. This was a bill to determine the separate rights of a number of parties in eighty acres of land in the Wyoming oil fields.

Kieffer v. Kinney Coastal Oil Co., 9 Fed. (2d) 260, 264, C. C. A. 8th Circuit.

There is no allegation in the bill that the state of Kansas has now any action pending on the subject matter described, or intends or threatens to bring any action concerning the flow of the Arkansas river or the diversions therefrom in the state of Colorado. What remains then? Nothing but the two suits described between private corporations over private rights. In order for this Court to take jurisdiction the bill would have to be amended so as to include and describe every person, firm and corporation in Kansas in a situation similar to the defendant, Water Users Association, who might bring similar suits. These parties would have to be impleaded in this suit in order that the Court, under well-settled rules, may hear and determine the whole controversy.

However, there is no allegation that any parties in Kansas threaten to bring any new suit. And to that end every defendant in the case of *The Water Users Association v. The Graham Ditch Company et al.*, and *The Water Users Association against the Coler Ditch Company et al.*, must be impleaded in this Court in this action, for otherwise the Court could not determine the entire controversy; their rights and defenses must be heard and determined, as between them and all of the parties interested on the Kansas side. Not only that, but if, as counsel say, there are many other parties in Colorado whose rights are affected by this litigation who, as they say, ought to have been made parties in the court below because any adjudication of the rights involved will affect them, then they must have their day in court. So this Court would find itself trying purely private controversies between private parties, without any public interests involved, involving anywhere from 130 to several hundred if the statements of the bill are correct. Evidence must be taken as to the rights of each individual appropriator in Colorado. This Court cannot embark upon such litigation.

This Court would be required to take full and entire jurisdiction of the entire controversy; the bill of complaint must be amended as we have suggested, all of the parties in Colorado likely to be affected must be made parties and the process of this Court issued to bring them into Court; each will have the right to file its separate answer and make its separate defense. There would thereby not be any avoidance of burdensome litigation. This Court is asked to use its injunctive process to prevent the defendant Water Users Association from further maintaining its private suits against private parties and of seeking to establish its claimed rights against the defendants in the cases below, without affording it a remedy, a day in court and a determination of the rights in this equitable tribune. No court has ever done that, either in England where this jurisdiction originated or in the United States where it has been adopted.

Since the bill does not allege that the state of Kansas is threatening to bring any suit or has any intention of bringing any suit, what action can this Court take at the solicitation of the complainant as against the state of Kansas? Can the state of Kansas be drawn into litigation which it is not contemplating, which it has no intention of bringing, make it a party and compel it to go to the expense of litigation against its will, since this Court, if it entertains this bill, must settle the whole controversy, not only as to the private irrigators, hostile to each other in the two states, but also as to the state of Kansas here made a defendant. We would have the curious situation of a sovereign state being brought into this Court and compelled against its inclination by a cross bill to proceed with litigation that it has not contemplated and which it has no intention of entering. Certainly this would be a most extraordinary proceeding, and yet apparently that is what counsel contemplate. The question of the present interest of the state of Kansas in this controversy we

discuss fully in a later section of this brief. It is sufficient to say here that the twenty-five years that have elapsed since *The State of Kansas v. Colorado* was commenced have changed conditions with reference to the principal contention of the state of Kansas in that case, which related to the underflow and its benefits to agriculture in the Arkansas valley.

The bill alleges that the counsel who wrote it "are informed" that they have no right of appeal to this Court from the cases pending below. What of it? A bill of peace is not sustained because the complainant has no right of appeal from the judgments where vexatious litigation is pending or threatened to be brought, but to prevent a multiplicity of lawsuits, and it is immaterial as to whether there is any right of appeal in these cases. This is a point in an application for a writ of prohibition, because usually the court will not interfere by prohibition where the complaining parties have the right of access to this Court by appeal of certiorari. It is not necessary in any event that the party should have a right of access to this Court by appeal. If he may come here by certiorari for error apparent prohibition will not lie, and in the cases described and which are complained of we are satisfied that the defendants in these cases may reach this Court by certiorari as other similar litigants in like cases have done before: (Sec. 347, U. S. Code 1926, amending sec. 240 Judicial Code; 2 Mason's U. S. Code Annot. Title 28, ch. 9, sec. 347; 43 St. L. 938.)

Much space is taken up in the bill with a voluminous and meticulous description of the administrative system of water distribution in the state of Colorado; it is asserted that if the defendant, the Water Users Association, as plaintiff below, shall succeed in procuring a judgment of priority that it will disrupt and destroy the whole administrative system of distributing water for irrigation in

the state of Colorado. There is no ground for this statement. Every appropriation in Colorado as against every other appropriation has a decreed right fixed in the local court having jurisdiction. This decree fixes the date of priority, and the amount of water to which the appropriator is entitled. The state engineer and the district officers having charge of the distribution have before them a list of these priorities by which they are entirely governed.

No administrative rule or any other authority can change the imperative direction of this adjudication: A is entitled to 100 second-feet by a priority of say 1881; B is entitled to 100 second-feet by a priority of 1882, the needs of A must be satisfied before B can have any water, and so on down the line. If by a later adjudication some other party secures a priority above both A and B then A and B must wait until that priority is satisfied. If this third party is adjudicated a priority later than A and earlier than B then they must be satisfied in that order. So in this particular case if the United States District Court for the District of Colorado determines that the Finney County Water Users Association has a priority superior to all of the defendants, none of these defendants can take water from the Arkansas river until the needs of the Water Users Association have been satisfied; they will be enjoined from diverting water until the decree has been complied with. If they refuse to obey the judgment, if they undertake to divert the water out of time and to the injury of the Water Users Association, they are subject to punishment for contempt. The Water Users' Association will be satisfied with a decree of the United States District Court for Colorado fixing its priority, and will undertake to enforce that priority as against the defendants by the process of the Federal District Court.

This Court has decided against a similar contention.

In the case of *Ex parte New York*, 256 U. S. 490, 502, 503, 65 L. Ed. 1057, 1063, this Court had to consider a similar contention where there was an application for a writ of prohibition to forbid the Court below from moving in an admiralty matter. And the Court said:

> "There is no substance in the contention that this result enables the state of New York to impose its local law upon the admiralty jurisdiction, to the detriment of the characteristic symmetry and uniformity of the rules of maritime law."

So there is no more difficulty or disturbance in intruding in the list of priorities among the water users of the state of Colorado a decree of the Federal Court than there would be in the intrusion of an adjudication of the same kind by the state court.

But suppose that the state of Kansas were to renew its suit against Colorado for a reasonable share of the flow of the water of the Arkansas river, and this court should adjudge to it one third or one-fourth of the flow, how would this court determine who among the Colorado irrigators should lose this water in order to obey the decree?

In such case, if the rights of Kansas were decreed to be superior to those of some, but inferior to those of others, of the Colorado users, the administration of the use of water by the Colorado officials would have to be adjusted to the provisions of the decree. Such an adjustment can as well be made pursuant to the decrees in the two suits in the United States District Court in Colorado.

The allegation at the close of paragraph twelfth of the bill, that the Finney County Water-Users Association, in its cases brought in the United States District Court in Colorado, will cause to be adjudicated the relative rights of the states of Colorado and Kansas in the benefits of the Arkansas river as a whole, require to be read in connection with the allegations in paragraph twelfth that questions

of priorities are presented in these cases, and with the allegations in paragraphs twelfth, fourteenth and fifteenth that adjudication in these cases would disrupt the administration by Colorado of water rights, and such allegation at the close of paragraph twelfth can mean nothing more, in view of the other allegations in the bill.

In paragraph 6 on page 12 *et seq.* of the bill, there is a long citation from the constitution, laws and decisions of Colorado, from which counsel for the complainant contend that Colorado as a sovereign state has rightfully adopted the policy of absolute control and exclusive use of the flow of the Arkansas river because it arises in that state. In support of that contention it cites *Hudson Water Company v. McCarter*, 209 U. S. 349, 52 L. Ed. 828. In that case the plaintiff in error, defendant below, was charged with violating a law of the state of New Jersey which forbade the fresh waters of that state to be diverted into some other state; the defendant had contracted to take the waters of the Passaic river from their natural flow and course and deliver them in Staten Island in the state of New York. The court upheld the New Jersey statute, as a proper exercise of the police power of the state, and decided against the plaintiff in error.

What application that has to the rights of the state of Kansas to the flow of the Arkansas river in its regular accustomed bed we do not understand. Perhaps counsel will enlighten us in their brief.

But there is a curious inconsistency in the contentions set forth on these pages with other parts of the bill. In one place counsel say that Colorado has the right to take and use all the flow of the Arkansas river as against the lower riparians. In another place they admit that *Kansas v. Colorado* established a comity between the two states by which Colorado can only make a reasonable use of the water, and that each state has a right to an equitable share in its

flow. Which of these two doctrines they intend to stand upon we hope they will inform the Court in their brief.

On page 27 *et seq.* there is a reference to the settlement of the case of the U. S. Irrigating Company against the same defendants impleaded in the case of *The Water Users Association v. The Graham Ditch Company et al.* We fail to see the relevance of this allusion to the issues here. If it indicates anything it indicates that one appropriator in Kansas controlling three ditches (instead of two as stated in the bill) had obtained a satisfactory settlement of its litigation, a final settlement which bars it from any future litigation and removes it from the category of those in Kansas who are threatening to bring suits. To that extent it defeats the purpose of their bill.

On page 40 *et. seq.*, counsel refer to the fact that the state of Colorado is an appropriator upon the Arkansas river and some of its tributaries and that the Water Users Association has not made the state a party defendant. We submit that this is a matter for the attention of the Federal Court of Colorado where these suits are pending.

If the Water Users Association chooses not to engage in a controversy with the state of Colorado it seems to us that that is its own affair.

It is also alleged that there are a considerable number of municipalities taking water from the Arkansas river and its tributaries that are not impleaded. The Water Users Association is not asking a priority as against the use of water for domestic purposes necessary to the health of the inhabitants of Colorado, wherein it is more generous than the Colorado irrigators are with the riparian municipalities on the Arkansas river in Kansas.

Counsel devote considerable space to a description of the civilization and prosperity that had been built up along the Arkansas river

in Colorado by means of its irrigation. We have watched the growth of this prosperity with admiration, mingled with distress, because its growth has been at the expense of the irrigators of western Kansas. Kansas had an irrigation law before Colorado was a state; all of its larger ditches, including the one owned by the defendant Water Users Association, were begun within four years after Colorado became a state, before there was any irrigation practiced in Colorado except on a small scale, and irrigation was a complete success in western Kansas. Within five or six years settlement increased rapidly, lands were taken up, put under water, with productive results, and we had a budding, growing civilization and prosperity that would have equaled that of Colorado except for the taking by the latter of the water upon which the prosperity of the irrigators along the Arkansas river in western Kansas depended. The Colorado people, seeing the success of irrigation in Kansas, adopted it, and being above the Kansas irrigators on the river were able to deprive them of the water that they had appropriated, and have used it in derogation of their rights for over forty years and thus built up this industry and wealth in Colorado. It has been built up at the expense of the lower irrigators in Kansas, in derogation of their rights, contrary to law, and in the face of a long course of decisions adverse to the claims of the Colorado irrigators, beginning with *Hoge v. Eaton*, 135 Fed. 411. Having thus deprived the Kansas irrigators of their rights and thereby obtained vast benefits, Colorado, counseled by the Colorado irrigators, now pleads these benefits in justification of the wrong.

An attempt is made to show the vast difference in soil and climate between the irrigated country along the Arkansas in eastern Colorado and the country irrigated, or attempted to be irrigated, in western Kansas. Of course there is no perceptible difference; no one crossing from Colorado into Kansas can notice the slightest

change in soil or climate. The change is so imperceptible from Pueblo to Dodge City that it cannot be noted. There is a slight increase in the rainfall as we proceed eastwardly, but nowhere between the Kansas line and at least eastern line of Finney county is dry farming profitable, nor can field crops be grown profitably without irrigation save in exceptional years of rare occurrence.

Irrigation in Colorado and Kansas is pursued by exactly the same methods and produces exactly the same results whenever the irrigators in Kansas get the water that is their due.

The Effect of the Decision in Kansas v. Colorado.

Running through the bill of complaint there are numerous allegations to the general effect that the Finney County Water Users Association cannot maintain the two suits described in the bill in the Federal Court of Colorado to assert its priority, because under the decision in *Kansas v. Colorado* no one but the state of Kansas can maintain any action regarding the flow of the Arkansas river or to prevent its diversion in Colorado. This is repeated over and over again. Indeed, counsel go so far as to say that the decision in *Kansas v. Colorado* dismissing the bill with leave to the complainant to renew the action, was in effect a decree quieting in Colorado and its citizens who are diverting the water of the Arkansas absolute and complete title to all of the water then being diverted at the time of the decree. In other words, that in this suit where the bill was dismissed without prejudice, the dismissal quieted in the appropriators title to all of the water then appropriated and diverted within the state of Colorado. We shall waste no time arguing that question; but if this contention be true, if none but the state of Kansas can assert a right to the flow of the Arkansas river within that state, then the defendant, the Finney County Water Users Association, has no right to sue, no standing in the Federal Court of Colo-

rado, and that Court has no jurisdiction, and indeed that is the plain contention of counsel, that the Federal Court has no jurisdiction of these two suits complained of. Certainly such allegations are not pertinent to a bill of peace. It is not the object and purpose of a bill of peace to enjoin suits of which the court has no jurisdiction, pending or threatened, but to take jurisdiction of numerous suits, vexatious or otherwise, to prevent multiplicity and settle all the rights. These allegations of lack of jurisdiction in the lower court might be pertinent in an application for a writ of prohibition under some circumstances, but generally the superior court will not grant a writ of prohibition on that ground where the complaining litigant can reach the superior court, the final court, by appeal or certiorari, although a writ has issued under such circumstances.

We are again puzzled as to what relief counsel really desire, but since, as it seems to us, they have utterly mistaken and misstated the whole effect of the decision in *Kansas v. Colorado*, we shall briefly examine the case. The case it too familiar to require any citation from it. Mr. Justice Brewer's statement of the case is sufficient for our purpose. The bill alleged that the state of Kansas was a large landowner of lands riparian to the Arkansas; that the entire valley of the Arkansas in Kansas, covering some 350 miles in length, varying from two to twenty-five miles in width, is underlaid with an "underflow," not percolating water in the ordinary sense, but a distinct body of water beneath the surface moving in a slow, continuous stream following the course of the surface river. That this underflow produced a subirrigation making it possible to raise crops on the bottom lands with but little rainfall, and that it was of immense value to the territory comprising from three to four thousand square miles; that the state of Colorado and its citizens, by so diverting the water of the Arkansas river in Colorado preventing

any of it but an occasional flood from crossing the state line, had so lowered this underflow—five feet it was charged—that it had ceased to be of any value for subirrigation; that as a result these lands which had been formerly valuable had almost lost their productive qualities and become nearly valueless. It was also further alleged that the riparian landowners on the river had been deprived of the use of the water for domestic purposes; that the towns and cities along the river had been deprived of the use of their water supply, thus impairing the health of the citizens of these towns and cities; that by reason of this deprivation the taxable value of these lands had been greatly diminished to the loss of the state of Kansas as a whole, and it was alleged that certain irrigators in the western part of the state had been deprived of the flow of water for their ditches. These ditches were not described, but were simply mentioned in a general way. The amount of irrigated land covered by them was about 40,000 acres as compared with some four million acres affected by the underflow.

Indeed the loss of the underflow was the gravamen of the whole bill. Having thus described the nature of the complaint Mr. Justice Brewer repeated several times in his opinion that this was a suit between states, the state of Kansas suing not only in its individual right as a riparian landowner but as *parens patriæ* and guardian for all the people of Kansas who were more or less directly injured by the wrongful acts of Colorado. He said that the wrongful acts were charged to be the acts of the state of Colorado through agencies that it had created. The effect of the decision so far as it declared that each state was entitled to an equitable share of the flow of the river, was not to fix or affect any individual right, but to establish a comity between the states, and the decision established the right and interest of all of the people of the state of Kansas in

the flow of the river generally. It did not determine any question of priority of rights as between particular appropriators in Kansas and in Colorado.

The bill alleges that the decree of dismissal in *Kansas v. Colorado*, although not a final judgment, nevertheless was *res adjudicata* as to the rights of the defendant Water Users Association and precludes it from maintaining these individual suits against individual irrigators. This contention is settled by this Court in *Brandon v. Ard*, 211 U. S. 11, 23, 53 L. Ed. 68. In that case certain settlers formed an association, procured a suit to be brought by the government against the railway company to cancel certain orders that had been issued withdrawing lands from preemption or homestead settlement. It was held that the decision in that suit did not bind a homestead claimant who was not a party to the suit, although he had been active in procuring the institution of the action by the government. The Court said: (p. 23.)

> "Ard was not, and was not sought to be, made a party to that action. He had no control of it, and was not entitled of right to be heard or to adduce evidence in it. He was not, in any legal sense, represented in the case, nor can he be regarded as privy to the issue between the United States and those whom it sued. His membership in the Settlers' Protective Association—which association, it is said, induced the United States to bring the action referred to—did not so connect him, in law, with the litigation, as that the judgment therein would bind him or be conclusive evidence against him. It must be assumed that the Attorney-general of the United States sued the Missouri-Kansas Company only in the discharge of his official duty, and for the purpose of asserting the rights of the government as against that company. He could not have represented merely private parties in that suit; he represented only the United States."

According to the allegations of the bill the defendant Water Users Association claims a priority as of 1880; that at that time it had

commenced and had ever since continued the beneficial appropriation of water from the Arkansas river in Kansas. When the suit of *Kansas v. Colorado* was brought this right had vested for twenty-three years. We submit that the defendant cannot be deprived of this right by a suit between the two states to which the defendant was not a party, over which he had no control, in which his rights were never set up, described or mentioned, except as a right in common, more or less, with all other citizens of the state; to hold thus would be to deprive this defendant of its vested rights without its day in court; without due process or any kind of process of law.

The Federal Courts Have Uniformly Upheld the Rights of Private Appropriators to Assert Their Priorities Regardless of State Lines.

We assume from the general tenor of the bill of complaint that counsel will raise here many of the same questions that were raised in the Court below in the two cases complained of and will make substantially the same argument there made on their motions to dismiss, which were overruled.

The case of *Wyoming v. Colorado*, 259 U. S. 419, settled definitely and finally that priority of appropriation, where the right to appropriate water for irrigation is recognized, is not affected by political divisions or state lines; an interstate river is treated as a whole; the rights of prior appropriators, lower state against other appropriators in the upper state, are exactly the same as though all the appropriators were within one state. That was a contest between two states. It was immediately followed by *Weiland v. Pioneer Irrigation Company*, 259 U. S. 498, 66 L. Ed. 1027, a case involving the right of an appropriator, a Nebraska corporation using the water in Nebraska, to assert its rights against later appropriators in the state of Colorado. The Court followed the decision of *Wyoming v. Colo-*

rado, applied it to the right of this private corporation and granted the irrigating company the relief prayed for. To avoid the force of these two decisions counsel for the defendants in the Court below maintained that the decisions which we cited covering disputes between irrigators on a stream partly in Nevada and partly in California; on a stream partly in Montana and partly in Wyoming and in the Pioneer Irrigating Company case, were disputes between irrigators in different states whose laws were exactly similar; states all of which recognized the arid states doctrine, the doctrine of strict prior appropriation; that the state of Kansas had never recognized the right to appropriate water for irrigation; that it held strictly to the common law doctrine, and therefore the cases which were there cited and which we now cite could not apply as between the Kansas plaintiffs and the Colorado defendants.

We are thus compelled to briefly note the statutes and decisions of these states: *Miller and Lux v. Rickey, &c., Co.,* 137 Fed. 573, an early and much quoted case, was a dispute over the waters of the Walker river, which rises in the state of California and flows across the boundary line into Nevada; the plaintiffs using the water for irrigation purposes in Nevada, brought suit in the Federal Court in Nevada against the defendants, alleging that they were diverting water in the state of California by dams and ditches for irrigation purposes to the detriment of plaintiffs' rights in Nevada. The Federal Court took jurisdiction, decided in favor of the Nevada claimants, wholly disregarded the state line, and wholly disregarded the fact that the laws of the two states as to water rights were entirely different, as we shall show, and the decision was affirmed in *Rickey, &c., Co. v. Miller and Lux,* 218 U. S. 258, 54 L. Ed. 1032. The law of Nevada is the arid states law of strict prior appropriation; the California law was first defined in *Lux v. Haggin,* 69 Cal.

255; the decision necessitated a special session of the California legislature. It was said in the syllabus:

> "1. A private corporation cannot divert the waters of a watercourse and thereby deprive the riparian proprietors of all use of the same without compensation made or tendered to such proprietors.
>
> "2. The owner of land by or through which a watercourse naturally and usually flows have a right of property of the water in the stream."

The Court will observe that this is the common-law doctrine of riparian rights. This was the doctrine applied in *Katz v. Walkinshaw*, 141 Cal. 117, as to percolating water. 4 Kinney on Irrigation, 2d ed., sec. 1726.

So this was a suit where there was the arid-states law of strict prior appropriation in Nevada and the common law or riparian system in California.

In *Bean v. Morris*, 221 U. S. 485, 55 L. Ed. 821, Morris, in Wyoming, had appropriated the waters in Sage creek. He brought suit against a junior appropriator in Montana. The sole question was whether such an action could be maintained by a citizen of Wyoming against a junior appropriator in Montana; the lower court gave Morris a priority of one hundred miners' inches as against the appropriator in Montana. This Court said that the sole question was whether this right of appropriation could be maintained by the Wyoming appropriator against the Montana appropriator, regardless of the state line, and held that it could. Wyoming is of course a strict prior-appropriation state. The law of Montana is fully set forth in Kinney on Irrigation, 2d ed., vol. 4, sec. 1880, and also in *Smith v. Denniff*, 24 Mont. 20. Montana recognizes the right of the riparian owner to the use of the water flowing by his land to the extent which he uses it and he cannot be deprived of the use of the water by appropriation for irrigation without compensation. In

short the law of Montana is a hybrid appropriation grafted on to the common law, but it is not in anywise a prior appropriation system such as Wyoming and Colorado. Nebraska has also a hybrid system which is fully discussed in Kinney on Irrigation, vol. 4, second edition, section 1899, in which he states that in Nebraska as in Colorado—

> "That the two doctrines of water rights, one the right of a riparian appropriator and the other the right of appropriation and application of the water to a beneficial use by a nonriparian owner, exist concurrently in the state."

The right of the riparian owner to the flow of the stream is a right inseparably annexed to the soil as a part and parcel of the land, but this right may be divested for irrigation by the exercise of the power of eminent domain and the payment of damages. The doctrine is fully covered by the decision of the Nebraska court in *Crawford County v. Hathaway*, 67 Neb. 325, 93 N. W. 781, so that the decision in the Pioneer Ditch case was not between two states having the same doctrine as to the water right, but between two states having completely diverse systems.

We turn now to the Kansas law; in General Statutes of Kansas, 1868, chapter 23, article 2, section 5 (page 192), in enumerating the objects for which corporations might be organized, in the thirty-fourth paragraph it was said:

> "The construction and maintenance of canals for the purposes of irrigation or manufacturing purposes."

Section 89 of the same chapter gave to irrigation corporations the right to eminent domain for their canals, the right to construct the same and to furnish water for irrigation for pay.

In 1872 this statute was slightly amended and reënacted by chapter 105, Laws of Kansas, 1872. In 1876, chapter 58, Laws of Kansas, 1876, there was a provision for the appropriation of lands by

irrigation corporations, granting them power to take so much water from a stream as might be necessary for their purposes; provided, however, that it should be unlawful "to take and use the waters of any stream in such manner as to interfere with or in anywise hinder, delay or injure any milling or irrigation improvements already constructed, *or to diminish the supply of water flowing to or through any established irrigation canal.*"

This is a clear recognition of the right of prior appropriation, although not using the exact language used in the arid states; but it recognizes the right to appropriate water, and it clearly recognizes *that first in time is first in right*, and that a subsequent appropriator cannot divert water to the injury or deprivation of the prior appropriator, and this law took effect before Colorado became a state. This statute has never been amended or repealed, and is still in force as Revised Statutes of 1923, secs. 13-606 and 13-608.

By chapter 115, Laws of Kansas, 1886, the full doctrine of prior appropriation was adopted as follows:

> "The right to the use of running water flowing in a river or stream in this state for the purpose of irrigation may be acquired by appropriation as between the appropriators, *and the one first in time is the one first in right.*"

The act also contains very full provisions as to the manner of appropriation, posting the notice and so on. It also legalizes the right of way of canal companies which had been constructed two years prior to January 1, 1886; this, however, was unnecessary. It also provided that any company that had constructed a canal, ditch or flume for purposes of irrigation more than five years prior to that time should have title by prescription. This would cover the ditch of the Finney County Water Users Association which was commenced in 1880. In 1889, by chapter 165, Laws of Kansas, 1889, irrigation ditch and canal companies were given the right of emi-

nent domain. In 1891, by chapter 133, Laws of Kansas, 1891, it was provided that in all that portion of the state of Kansas situated west of the ninety-ninth meridian, comprising more than one-third of the state, all natural water, whether standing or running, whether surface or subterranean, is devoted first to the purposes of irrigation, in aid of agriculture, subject to ordinary domestic uses. In 1899, chapter 95, Laws of Kansas, 1899, authorized the appropriation of lands for irrigation purposes, and chapter 151 reauthorized the condemnation of lands for irrigation canals and reservoirs. In 1895, by chapter 155, Laws of Kansas, 1895, a Board of Irrigation was created, and authorized to make experiments.

It will be observed, then, that Kansas has had ten statutes, commencing in 1868, recognizing the use of water for irrigation and the right of prior appropriation, and in every essential detail protecting the irrigator as fully as do the laws of Colorado and Wyoming.

Under the existing statutes of Kansas the subject of appropriation and use of water for irrigation is extensively covered.

Corporations may be organized to contract and maintain dams and canals for irrigation. (Clause 37, sec. 17-202, Revised Statutes of Kansas, 1923.)

The right may be condemned to take water for purposes of irrigation. (Sections 42-109 to 42-118, *id.*)

The right of way may be condemned to construct and maintain canal ditches and sluices for irrigation. (Section 42-120, *id.*)

The same as to works and canals for irrigation. (Sections 42-316 and 42-317, *id.*)

The appropriation and use of water for irrigation is authorized and regulated. (Sections 42-101 to 42-108; sections 42-120 to 42-122; sections 42-301 to 42-304; sections 42-310 to 42-315; sections 42-321 to 42-3111, *id.*)

Referring to section 42-301, *id.*, which authorizes the appropriation of water for the purposes of irrigation west of the ninety-ninth meridian, the following counties in Kansas, through which runs the Arkansas river, are situate west of that meridian, beginning at the west line of the state: Hamilton, Kearny, Finney, Gray, Ford, Edwards and Pawnee.

The opinion in *Kansas v. Colorado* is erroneous in so far as it says that Kansas is a strict riparian-rights state, and the Court undoubtedly fell into that error by following the syllabi in *Clark v. Allaman*, 71 Kan. 206, which held that prior to 1886 Kansas was a strictly common-law state and the right of irrigation was not recognized. Evidently in *Clark v. Allaman* neither the Court nor the counsel who briefed the case had noticed the earlier statutes which we have cited and which were still in full force and effect at that time. The controversy in *Clark v. Allaman*, however, was simply between a riparian owner whose rights to the flow of the stream had vested prior to the time of the claimed appropriation, and the Court held that the riparian right was superior to the subsequent right of irrigation. The Court ignored the fact that in the same year that the common law was continued, 1868, there was in the same volume conclusive statutory recognition of the right of irrigation, which to that extent repealed the common law as it existed in England and the Eastern states. For sixty years Kansas has recognized the right of irrigation, the right of appropriation, the right of priority, and the defendant Water Users Association having acquired its rights under these statutes can assert them as against the subsequent appropriators in Colorado. It appears, then, that in upholding the rights of priority for irrigation in California, in Montana and in Nebraska, this Court has paid but little attention to whether the systems in the two states were similar or conflicting. This is particularly true in the case of *Rickey, &c., Co. v. Miller and Lux.* But

if it is to be the criterion, then we have shown that Kansas adopted irrigation before Colorado became a state.

We assume of course that there will be no question that this Court, as a federal court, will take judicial notice of all of the statutes that we have cited.

In Conclusion.

We contend that the bill of complaint is wholly lacking in equity. That considered as a bill of peace it is fatally defective because—

(*a*) It does not allege that the state of Kansas threatens or intends to begin any suit of any kind concerning the flow of the Arkansas river.

(*b*) Because it does not allege that any party other than the Finney County Water Users Association threatens or intends to begin any suit similar to those now pending in the Federal Court of Colorado or assert any other kind of a right in the flow of the Arkansas river.

(*c*) Because the bill contains no information upon which the Court could implead parties interested in the controversies described or so that the Court may determine whether their rights of action are such that this Court could take jurisdiction of all of the supposed controversies and settle all of them by one decree.

(*d*) Because the complainant seeks to enjoin the Finney County Water Users Association from pursuing a claimed right in the Federal Court of Colorado, without affording it any relief in this or any other Court.

Because the state of Colorado is not a proper party complainant; has no interest in the subject matter of the suits pending in the Federal Court of Colorado other or different from that which it has in any litigation between citizens of Colorado and citizens of other states, which might be determined adversely to the citizens of Colorado.

Because this Court did not decide in the case of *Kansas v. Colorado* that none but the state of Kansas can maintain an action concerning the flow of the Arkansas river, and that such suit could only be brought in this Court. That decision did not attempt to determine any private vested rights in the flow of the river acquired by appropriation under and protected by the laws of the state of Kansas, which are being asserted in the suits described; and would not have deprived the Finney County Water Users Association of its vested right without due process of law.

Because the bill is so vague, uncertain and contradictory in its language that this Court cannot determine what relief the complainant seeks, or upon what specific ground it prays for relief.

That if the bill is an attempt, as some of its allegations would indicate, to prohibit the United States District Court for the District of Colorado from proceeding further with the suits described for lack of jurisdiction, it is fatally defective in form and discloses in the complainant no right to such relief.

It is therefore respectfully submitted that the bill of complainant should be dismissed.

Respectfully submitted,

WILLIAM A. SMITH,
Attorney-general of the State of Kansas,
JOHN G. EGAN,
Asst. Attorney-general of the State of Kansas,
CHESTER I. LONG,
Solicitors for the State of Kansas.

F. DUMONT SMITH,
LAWRENCE LEWIS,
CHESTER I. LONG,
Solicitors for the Finney County Water Users' Association, a Corporation, Defendants.

□